

## SUBCHAPTER R—ACCESS TO INFORMATION

### PART 171—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

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SOURCE: 45 FR 58108, Sept. 2, 1980, unless otherwise noted.

### Subpart A—General Policy and Procedures

#### § 171.1 Availability of information.

(a) Unclassified information, documents, and forms which have previously been provided to the public as part of the normal services of the Department of State will continue to be made available on the same basis as before. Any Departmental officer who receives a request for records through normal channels of contact with the public, media, or the Congress which would not normally be made available shall advise the requester that the request will be referred to the Information and Privacy Coordinator, Foreign Affairs Information Management Center, for processing under the appropriate statute or executive order as provided in these regulations.

(b) All identifiable records of the Department of State shall be made available to the public upon compliance with the procedures established in this subchapter, except to the extent that a determination is made to withhold a record in accordance with an appropriate exemption as provided herein.

#### § 171.2 Requests for information.

(a) Requests for identifiable records in accordance with this subchapter may be made by the public in person during regular business hours from the Department of State, 2201 C Street, NW., Washington, DC where the receptionist will refer the requester to the proper office for service and the necessary forms for making a request.

(b) Requests by mail and referrals from other agencies should be addressed to the Information and Privacy

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Coordinator, Foreign Affairs Information Management Center, Room 1239, Department of State, Washington, DC 20520, who will coordinate action as specified in this request. In addition, requests may be directed to the Department's field offices and overseas posts; routine, unclassified, administrative records may be released to the individual if it is determined that such release is authorized. Any unfilled request shall be submitted to the Information and Privacy Coordinator. Individuals are urged to clearly indicate on their requests the statute under which they are requesting access to information; this notation will facilitate the processing of the request by the Department.

(c) While every effort is made to guarantee the greatest possible access to all requesters, regardless of the specific statute under which the information is requested, the following guidance is provided for individuals in requesting records:

(1) *Freedom of Information Act*. Requests for documents concerning the general activities of government and of the Department of State in particular (see subpart B).

(2) *E. O. 12065*. Requests for mandatory review and declassification of Department records and requests for access by former Presidential appointees (see subpart C).

(3) *Privacy Act*. Requests from U.S. citizens or resident aliens for records pertaining to themselves and maintained by the Department under the individual's name (see subpart D).

(4) *Ethics in Government Act*. Requests for the financial Disclosure Statements of Department Employees covered by this Act (see subpart E).

(d) The burden of adequately identifying the record so requested lies with the requester. Individuals may seek assistance regarding any facet of their requests from the Information and Privacy Coordinator.

#### § 171.3 Public reading room.

A public reading room or area where records may be made available is located in the Department of State, 2201 C Street, NW., Washington, DC 20520. The receptionist will refer the applicant to the proper room. All those stat-

utes, regulations, and guidelines pertaining to access to information required to be made available to the public shall be located in the reading room. Fees will not be charged for access by the public to this room or the indexes and regulations contained therein, but fees, in accordance with § 171.6, will be charged for furnishing copies thereof. Persons desiring to utilize their own portable copying equipment should request approval in advance from the Information and Privacy Coordinator. Any arrangements for the use of such equipment must be consistent with security regulations of the Department of State and are subject to the availability of personnel to monitor such copying.

#### § 171.4 Extension of time limits.

While every effort is made to meet the time limits cited in each section of this subchapter, unusual circumstances may arise which would necessitate the extension of these time limits. Extensions shall be granted in those instances where it is necessary, in order to guarantee proper processing of the request, to:

(a) Search for and collect the requested records from overseas posts or other establishments that are separate from the office processing the request;

(b) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(c) Consult with another agency having a substantial interest in the determination of the request or among two or more components of the Department of State having substantial subject matter interest therein. Such consultation shall be conducted with all practicable speed. In such instances the requester shall be given written notification by the Information and Privacy Coordinator of the extension of the time limit and the reason for such extension.

#### § 171.5 Archival records.

The Department ordinarily transfers custody of records as soon as practicable after they become twenty (20) years old to the National Archives and

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Records Service. These records are generally transferred in large blocks defined by years and/or major subject categories. Correspondence regarding access to these records should be addressed to the Chief, Diplomatic Branch, Civil Records Divisions, National Archives and Record Service, Washington, DC 20400.

### § 171.6 Fees-general.

(a) The Department will charge a duplication fee of \$.25 per page for copies of documents which are identified and made available to an individual pursuant to a request except, that there will be no charge for requests involving costs of \$10.00 or less.

(b) The Department will charge the actual cost of production for copies prepared by computer (such as tapes or printouts), including operator time.

(c) The Department will charge the actual direct costs of producing the document(s) for methods of reproduction or duplication other than those described in paragraphs (a) and (b) of this section.

(d) In those cases when estimated duplication charges are likely to exceed \$25, the Department shall notify requesters of the estimated amount of fees, unless they have indicated in advance their willingness to pay fees as high as those anticipated. Such notice shall offer requesters the opportunity to confer with Department personnel with the objective of reformulating requests to meet their needs at lower costs.

(e) Certification under the official seal that a copy or extract made from an official document is a true copy; the fee for certifying each copy of each page is \$2.00.

(f) The Department shall charge the actual costs for sending documents by special methods such as express mails, etc. when such is requested.

(g) Remittances shall be in the form of either a personal check or bank draft drawn on a bank in the United States, a postal money order, or cash. Remittance shall be made payable to the order of the Treasurer of the United States and delivered or mailed to the Information and Privacy Coordinator, Foreign Affairs Information Management Center, Room 1239, De-

partment of State, 2201 C Street, NW., Washington, DC, 20520. The Department will assume no responsibility for cash sent by mail.

(h) Fees must be paid in full prior to release of requested documents and/or provision of service described above.

(i) A receipt for fees paid will be given only upon request.

(j) See §171.13 for additional fees chargeable for Freedom of Information requests.

[52 FR 32123, Aug. 26, 1987]

## Subpart B—Freedom of Information Provisions

### § 171.10 Definitions.

As used in this subpart, the following definitions shall apply:

(a) The term *identifiable* means, in the context of a request for a record, a description which enables a professional employee of the Department who is familiar with the subject area of the request to locate the record with a reasonable amount of effort. Such a description, if possible, should include date, format, subject matter, country concerned, office of mission originating or receiving the record, and the name of any person to whom the record is known to relate.

(b) The term *record* includes all books, papers, maps, photographs, or other documentary material, or copies thereof, regardless of physical form or characteristics, made in or receiving by the Department of State (including Foreign Service posts abroad) and preserved as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Department or the Foreign Service. It does not include copies of the records of other Government agencies (except those which have been expressly placed under the control of the Department of State upon termination of another agency), foreign government, international organizations, or non-governmental entities unless they evidence organization, functions, policies, decisions, procedures, operations, or activities of the Department of State. It does not include records not already in existence which would need

to be created specifically to meet a request. It does not include records in the Berlin Document Center.

(c) The term *agency* includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(d) The term *direct costs* means those expenditures which the Department actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(e) The term *search* includes all time spent looking for identifying and retrieving material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Department will attempt to ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the Department and the requester. For example, the Department will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" should be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure (see paragraph (g) of this section). Searches may be done manually or by computer using existing programming.

(f) The term *duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

(g) The term *review* refers to the process of examining documents located to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general, legal or policy issues regarding the application of exemptions.

(h) The term *commercial use request* refers to a request from or on behalf of one who requests for information for a use or purpose that furthers the commercial, trade or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester belongs within this category, the Department will look at the use to which the requester will make of the documents requested.

(i) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(j) The term *non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (h) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(k) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples

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are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (*e.g.*, electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a likelihood of publication through that organization, even though not actually employed by it. Likelihood of publication can be demonstrated through, for example, a publication contract or past publication record. Similarly, the absence of a publication record, especially where the requester has previously received records from the Department as a “representative of the news media” will be taken into account in determining the likelihood of publication.

[45 FR 58108, Sept. 2, 1980, as amended at 52 FR 32124, Aug. 26, 1987]

### § 171.11 Exemptions.

(a) The following categories of records maintained by the Department of State may be exempted from disclosure:

(1) Records specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact properly classified pursuant to such executive order.

(2) Records related solely to the internal personnel rules and practices of an agency.

(3) Records specifically exempted from disclosure by statute. Included in this category are records relating to the officers and employees of the Foreign Service, including efficiency records (sec. 612 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 986), the records of the Department of State or of diplomatic and consular officers of the United States pertaining to the issuance or refusal of visas or permits to enter the United States (sec. 222(f), of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1202(f)), “Restricted Data” under section 224 of the Atomic Energy Act (42 U.S.C. 2274), records of expenditures certified under 22 U.S.C. 2671 and 31 U.S.C. 107, records subject to section

102(d) of the National Security Act of 1947 (61 Stat. 498) and records subject to section 501 of the U.S. Information and Educational Exchange Act of 1948 (22 U.S.C. 1461, as amended).

(4) Records of trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) Records which are inter-agency or intra-agency memorandums, letters, telegrams, or airgrams which would not be available by law to a party other than an agency in litigation with the agency.

(6) Records such as personnel and medical files and similar files the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(9) Geological or geophysical information and data, including maps, concerning wells.

(b) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under paragraph (a) of this section. Normally a portion of a record shall be considered reasonably segregable when segregation can produce an intelligible record which is not distorted out of context and does not contradict the record being withheld.

[45 FR 58108, Sept. 2, 1980, as amended at 52 FR 32124, Aug. 26, 1987; 64 FR 54539, Oct. 7, 1999]

**§ 171.12 Time limits/expedited processing.**

(a) Whenever possible, the Department will furnish the requested records within 20 days (excluding Saturdays, Sundays, and legal public holidays), except as cited in § 171.4.

(b) A separate queue shall be established for requests meeting the test for expeditious processing. Requests for expedited processing shall be granted to the requester after the requester has demonstrated that a compelling need exists. A notice of the determination as to whether to grant expedited processing shall be provided to the requester within ten (10) days of the date of the request. The request for expedited processing shall set forth with specificity the relevant facts upon which the requester relies and demonstrate to the Department that substantive records relevant to the stated needs may exist and be deemed releasable.

(c) A “compelling need” is deemed to exist where the requester can demonstrate one of the following:

(1) Failure to obtain requested information on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) The information is urgently needed by an individual primarily engaged

in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. News media requesters would normally qualify; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just a particular segment or group.

(i) *Urgently needed.* The information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the newsbreaking nature of the information;

(ii) *Actual or alleged Federal Government activity.* The information concerns some actions taken, contemplated, or alleged by or about the government of the United States, or one of its components or agencies, including the Congress;

(3) Substantial due process rights of the requester would be impaired by the failure to process immediately; or

(4) Substantial humanitarian concerns would be harmed by the failure to process immediately.

(d) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the ten (10) days required for decisions on expedited access.

(e)(1) The Department’s decision to deny expedition may be appealed to the Chief of the Requester Liaison Division, Room 1512, Department of State, 2201 C Street, NW., Washington, D.C. 20520. Appeals should contain as much information and documentation as possible to support the request for expedited processing in accordance with the criteria set forth in paragraph (c) of this section.

(2) The Requester Liaison Division Chief will issue a final decision in writing within ten (10) days from the date

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on which the Department received the appeal.

[62 FR 48758, Sept. 17, 1997]

### § 171.13 Fees.

(a) In addition to fees cited in § 171.6, the following shall be applicable with respect to services rendered to members of the public under this subpart:

(1) The following is the range of categories and average grade levels for employees within each category who perform the search and review functions involved in responding to a FOIA request:

(i) Administrative/clerical (to include GS-1 through GS-8 or FS-9): GS-5/5 or FS-9/1.

(ii) Professional (to include GS-9 through GS-13 or FS-5 through FS-2): GS-11/5 or FS-4/4.

(iii) Executive (to include GS-14 through SES or FS-2 through SFS): GS-15/1 or FS-1/1.

(2) The salary rates for these categories will be calculated based on the rates published on the "Department of State Salary Chart" effective at the time that the function was actually performed; copies of this chart are available in the Public Reading Room. The actual fee schedule for each category will be included in the Department's acknowledgment letter.

(3) The costs for manual search include the salary of the category of the employee who actually performed the search function (as provided in paragraph (a)(1) of this section) above plus an additional 16 percent of that rate to cover benefits.

(4) The cost for computer searches will be calculated based on the salary of the category of the employee who actually performed the computer search (as provided in paragraph (a)(1) of this section) plus 16 percent of that rate to cover benefits, in addition to the direct costs of the central processing unit, input-output devices, and memory capacity of the actual computer configuration.

(5) Only requesters who are seeking documents for commercial use will be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. The cost for review will be calculated based on the salary of the category of

the employee who actually performed the review (as provided in paragraph (a)(1) of this section) plus 16 percent of the rate to cover benefits. Charges will be assessed only for the initial review (i.e., review undertaken the first time in order to analyze the applicability of specific exemption(s) to a particular record or portion of a record) and not for review at the administrative appeal level of the exemption(s) already applied.

(6) If records requested under this subpart are stored elsewhere than the headquarters of the Department of State at 2201 C Street, NW., Washington, DC, the special cost of returning such records to the headquarters shall be included in the search costs. These costs will be computed at the actual costs of transportation of either a person or the requested record between the place where the record is stored and Department headquarters when, for time or other reasons, it is not feasible to rely on Government mail service or diplomatic pouch.

(7) When no specific fee has been established for a service, or the request for a service does not fall under one of the above categories due to the amount or size or type thereof, the Information and Privacy Coordinator is authorized to establish an appropriate fee, pursuant to the criteria established in Office of Management and Budget Circular No. A-25, entitled "User Charges."

(b) Where it is anticipated that the fees chargeable under this subpart will amount to more than \$25 and the requester has not indicated in advance her/his willingness to pay fees as high as anticipated, the requester shall be promptly notified of the amount of the anticipated fees or such portion thereof as can readily be estimated. The notice or request for an advance deposit shall extend an offer to the requester to confer with knowledgeable Departmental personnel in an attempt to reformulate the request in a manner which will reduce the fees and meet the needs of the requester. Dispatch of such a notice or request shall suspend the running of the period for response by the Department until a reply is received from the requester.

(c) Search costs are due and payable even if the record which was requested

cannot be located after all reasonable efforts have been made, or if the Department determines that a record which has been requested, but which is exempt from disclosure under this subpart, is to be withheld.

(d) The Department will begin assessing interest charges on an unpaid bill starting the 31st day following the day on which the billing was sent. The accrual of interest will be stayed upon receipt of the fee, rather than upon its processing by the Department. Interest will be at the rate prescribed in section 3717 of title 31 U.S.C.

(e) A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Department reasonably believes that a requester or a group of requesters acting in concert is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Department will aggregate any such requests and charge accordingly.

(f) The Department will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The Department estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, the Department will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) Requesters who have previously failed to pay fees charged in a timely fashion (i.e., within 30 days of the date of the billing), the Department will require such requesters to pay the full amount owed plus any applicable interest as provided above or demonstrate that they have, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process new requests or pending requests from such requesters.

When the Department acts under paragraph (f)(1) or (2) of this section, the administrative time limit prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests plus permissible extensions of that time limit) will begin only after the Department has received payments described above.

(g) In accordance with the provisions and authorities of the Debt Collection Act of 1982 (Pub. L. 97-365), the Department reserves the right to disclose information to consumer reporting agencies and to use collection agencies, where appropriate, to encourage repayment.

[52 FR 32125, Aug. 26, 1987]

**§ 171.14 Categories of requesters for fee purposes.**

There are four categories of requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories. The Department will take into account information provided by requesters in determining their eligibility for inclusion in one of these categories is as defined in § 171.10. It is in the requester's best interest to provide as much information as possible to demonstrate inclusion within a non-commercial category of fee treatment.

(a) The Department will assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought for commercial use. Commercial use requesters are entitled to neither two hours of free search time nor 100 free pages of reproduction of documents.

(b) The Department will provide documents to educational and non-commercial scientific institutions for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request being made is authorized by, and under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or



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scientific (if the request is from a non-commercial scientific institution) research.

(c) The Department will provide documents to representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 171.10(k), and the request must not be made for a commercial use. In reference to this class of requesters, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

(d) The Department will charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction.

(e) In making determinations under this section, the Department may take into account whether requesters who previously were granted (b), (c), or (d) status did in fact use the requested records for purposes compatible with the status accorded them.

[52 FR 32125, Aug. 26, 1987]

### § 171.15 Fee waivers and appeals.

(a) Waiver or reduction of any fee provided for in §§ 171.6 and 171.13 may be made upon a determination by the Chief of the Request Processing Section, Room 1239, Department of State, 2201 C Street, NW., Washington, DC 20520. The Department shall furnish documents without charge or at a reduced charge provided that: Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(1) In order to determine whether disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, the Department will consider the following four factors:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding; and

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, the Department will consider the following two factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(b) The Department will not consider waiver or reduction of fees for requesters (persons or organizations) from whom unpaid fees remain due to the Department for another information access request.

(c) (1) The Department's decision to refuse to waive or reduce fees as requested under paragraph (a) of this section may be appealed to the Chief of the Information Access Branch, Room 1239, Department of State, 2201 C

Street NW., Washington, DC 20520. Appeals should contain as much information and documentation as possible to support the request for a waiver or reduction of fees.

(2) Appeals will be reviewed by the Information Access Branch Chief who may consult with other officials of the Department as appropriate. The requester will be notified within thirty working days from the date on which the Department received the appeal.

[52 FR 32126, Aug. 26, 1987]

**§ 171.16 Predisclosure notification procedures for confidential commercial information.**

(a) *In general.* Confidential commercial information provided to the Department shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential Commercial Information* means records provided to the Department by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the Department. The term *submitter* includes, but is not limited to, corporations, state governments, and foreign governments.

(b) *Notice to submitters.* Whenever the Department receives a Freedom of Information Act request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter is entitled to receive notice of that request, the Department shall promptly notify the submitter that it has received the request, unless such notice is excused under paragraph (g) of this section. The notice shall be in writing and either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known ad-

dress. Where notice is required to be given to a voluminous number of submitters, in lieu of mailing the notice may be posted or published in a manner and place reasonably calculated to provide notice to the submitters.

(c) *When notice required.* (1) For confidential commercial information submitted prior to January 1, 1988, the Department shall provide a submitter with notice of a receipt of a Freedom of Information Act request whenever:

(i) The records are less than ten (10) years old and the information has been designated by the submitter as confidential commercial information; or

(ii) The Department has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted to the Department on or after January 1, 1988, the Department shall provide a submitter with notice of receipt of a Freedom of Information Act request whenever:

(i) The submitter has designated the information as confidential commercial information pursuant to the requirements of this section; or

(ii) The Department has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than ten (10) years after the date of submission unless the submitter provides reasonable justification for a designated period of greater duration.

(4) A submitter shall use good-faith efforts to designate by appropriate markings, either at the time a record is submitted to the Department or within a reasonable period of time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public.

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(5) Whenever the Department provides notice to the submitter in accordance with paragraph (c) of this section, the Department shall at the same time provide written notice to the requester that it has done so.

(d) Opportunity to object to disclosure. To the extent permitted by law, the notice required by paragraph (c) of this section shall afford a submitter a reasonable period of time within which the submitter or its authorized representative may provide the Department with a written objection to the disclosure of the confidential commercial information. The objection shall set forth in detail all grounds for withholding information and demonstrate why the submitter believes that the records contain confidential commercial information. Except where a certification already had been made in conformance with the requirements of paragraph (c)(4) of this section, the objection shall be accompanied by a certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(e) *Notice of intent to disclosure.* (1) The Department shall give careful consideration to objections made by a submitter pursuant to paragraph (d) of this section prior to making any administrative determination of the issue. Whenever the Department decides to disclose information over the objection of a submitter, the Department shall forward to the submitter a written notice which shall include:

- (i) A statement of the reasons for which the submitter's disclosure objections were not sustained;
- (ii) A description of the information to be disclosed; and
- (iii) A specified disclosure date.

(2) To the extent permitted by law, the notice required to be given by paragraph (e)(1) of this section shall be provided to the submitter a reasonable number of days prior to the specified disclosure date.

(3) Whenever the Department provides notice to the submitter in accordance with paragraphs (e)(1) and (e)(2) of this section, the Department shall at the same time notify the requester that such notice has been given and the proposed date for disclosure.

(f) *Notice of lawsuit.* Whenever a requester brings suit seeking to compel the disclosure of information for which notice is required pursuant to paragraph (c) of this section, the Department shall promptly notify the submitter that such suit has been filed.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(4) Disclosure of the information is required by a Department rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information requested was not designated by the submitter as exempt from disclosure in accordance with paragraph (c) of this section, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the Department has substantial reason to believe that the disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such case, the Department must provide the submitter with written notice of any final

administrative disclosure determination within a reasonably number of days prior to the specified disclosure date.

[55 FR 9318, Mar. 13, 1990]

### Subpart C—Executive Order 12958 Provisions

SOURCE: 64 FR 25430, May 12, 1999, unless otherwise noted.

#### § 171.20 Definitions.

As used in this subpart, the following definitions shall apply:

(a) *National security* means the national defense or foreign relations of the United States.

(b) *Information* means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(c) *Control* means the authority of the agency that originated the information, or its successor in function, to regulate access to the information.

(d) *Classified national security information* (hereafter classified information) means information that has been determined pursuant to this Executive Order 12958 or any predecessor Order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(e) *Foreign government information* means:

(1) Information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) Information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) Information received and treated as “foreign government information” under the terms of a predecessor Order.

(f) *Classification* means the act or process by which information is determined to be classified information.

(g) *Original classification* means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure.

(h) *Original classification authority* means an individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(i) *Unauthorized disclosure* means a communication or physical transfer of classified information to an unauthorized recipient.

(j) *Agency* means any “executive agency” as defined in 5 U.S.C. 105, and any other entity within the executive branch that comes into the possession of classified information.

(k) *Senior agency official* means the official designated by the agency head under section 5.6(C) of this Executive Order 12958 to direct and administer the agency’s program under which information is classified, safeguarded, and declassified.

(l) *Confidential source* means any individual or organization that has provided, or that may reasonably be expected to provide information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(m) *Damage to the national security* means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value and utility of that information.

(n) *Presidential appointees* includes former officials of the Department of State or other U.S. Government agencies who held policy positions and were appointed by the President, by and with the advice and consent of the Senate, at the level of Ambassador, Assistant Secretary of State or above. It does not include Foreign Service Officers as a class or persons who merely received assignment commissions as Foreign

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Service Officers, Foreign Service Reserve Officers, Foreign Service Staff Officers and employees.

### § 171.21 Access to records.

(a) *Request for mandatory classification review.* For a request for classified records to be processed under section 3.6 of E.O. 12958, it must describe the record(s) with sufficient specificity to enable the agency to locate the record(s) with a reasonable amount of effort. Whenever a request does not reasonably describe the record(s), the Department shall notify the requester that no further action will be taken unless additional information is provided, or the scope of the request is narrowed.

(b) *Mandatory review.* A request for declassification under the Executive Order 12958 is termed a mandatory review; it is separate from and different than a request made under the Freedom of Information Act (FOIA). When a requester submits a request under both mandatory review and FOIA, the Department shall require the requester to elect one or the other. If the requester fails to elect one or the other, the request will be treated as a FOIA request unless the materials requested are subject only to mandatory review.

(c) *Scope.* All information classified under this or predecessor orders shall be subject to declassification review upon request by a member of the public, a government employee or agency, with the following exceptions:

(1) Information exempted from search and review under the Central Intelligence Information Act;

(2) Information which is the subject of pending litigation;

(3) Information which has been reviewed and withheld within the past two years;

(4) Information originated by the incumbent President; the incumbent President's White House staff; committees, commissions or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President. If the information requested is the subject of pending litigation, or has been reviewed for declassification and withheld within the past two years, the De-

partment will inform the requester of these facts and of the requester's appeal rights. The Archivist of the United States shall establish procedures for the declassification of Presidential or White House materials accessioned into the National Archives or maintained in the Presidential libraries.

(d) The Department may refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or nonexistence is itself classified.

(e) *Processing.* In responding to mandatory review requests, the Department shall either make a prompt declassification determination and notify the requester accordingly, or inform the requester of the additional time needed to process the request. The Department shall ordinarily make a final determination within 180 days from the date of receipt. When information cannot be declassified in its entirety, the Department will make reasonable efforts to release those declassified portions of the requested information that constitute a coherent segment.

(f) *Other agency records.* When the Department receives a request for records in its possession that were originated by another agency, it shall refer the request and the pertinent records to the originating agency unless that agency has agreed that the Department may review the records in accordance with declassification guides or guidelines provided by the originating agency. The originating agency shall communicate its declassification determination to the Department.

(g) *Foreign government information.* When foreign government information is being considered for declassification, the declassifying agency is the agency that originally received or classified the information. The declassifying agency shall:

(1) Determine whether the information is subject to a treaty or international agreement that would prevent its declassification;

(2) Determine whether the information is subject to section 1.6(d) (5), (6) or (8) of the Executive Order 12958;

(3) Consult with any other concerned agencies;

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(4) Consult with the Department and/or the foreign government, as appropriate.

(h) *Cryptologic and intelligence information.* Mandatory declassification review requests for cryptologic information and information concerning intelligence activities or intelligence sources or methods shall be processed solely in accordance with special procedures established by the Secretary of Defense and the Director of Central Intelligence, respectively.

(i) *Appeals.* Upon denial of an initial request in whole or in part, the Department shall notify the requester of the right of an administrative appeal, which must be filed within 60 days of receipt of the denial. The Department shall normally make a determination within 60 days following receipt of an appeal. If additional time is needed to make a determination, the Department shall notify the requester of the additional time needed and provide the requester with a reason for extension. The Department shall notify the requester in writing of the final determination and of the reasons for any denial.

(j) *Appeals to the Interagency Security Classification Appeals Panel.* The Interagency Security Classification Appeals Panel shall publish in the FEDERAL REGISTER the rules and procedures for bringing mandatory declassification appeals before it.

### § 171.22 Determination in disputed cases.

(a) It is presumed that information that continues to meet the classification requirements under this Executive Order 12958 requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the Secretary of State or the Department's senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

(b) This provision does not:

(1) Amplify or modify the substantive criteria or procedures for classification; or

(2) Create any substantive or procedural rights subject to judicial review.

### § 171.23 Challenges to classification.

(a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information. An authorized holder is any individual, including an individual external to the Department, who has been granted access to specific classified information in accordance with section 4.2(g) of the Executive Order 12958.

(b) Challenges shall be presented to an original classification authority with jurisdiction over the information. A formal challenge under section 1.9 of the Executive Order 12958 must be in writing, but need not be any more specific than to question why information is or is not classified, or is classified at a certain level. The classification challenge provision is not intended to prevent an authorized holder from informally questioning the classification status of particular information. Such informal inquiries are encouraged in order to limit the number of formal challenges.

(c) Whenever the Department receives a classification challenge to information that has been the subject of a challenge within the past two years, or that is the subject of pending litigation, it is not required to process the challenge beyond informing the challenger of this fact and of the challenger's appeal rights, if any.

(d) Challenges, responses and appeals shall, if possible, be unclassified. However, classified information contained in a challenge, a response from the department or an appeal shall be handled and protected in accordance with this Executive Order 12958 and its implementing directives.

(e) Information being challenged for classification shall remain classified unless and until a decision is made to declassify it.

(f) The Secretary of State or the senior agency official of the Department shall establish procedures under which

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authorized holders of classified information may make such challenges. These procedures shall assure that:

(1) No retribution is taken against an authorized holder bringing a challenge in good faith;

(2) An opportunity is provided for review by an impartial official or panel; and

(3) Classification challenges shall be considered separately from FOIA or other access requests.

(g) Processing an initial written response to a challenge shall be provided within 60 days. If the Department is unable to respond to the challenge within 60 days, it must acknowledge the challenge in writing and provide a date by which it will respond. The Department's acknowledgement must state that if no response is received within 120 days, the challenger has the right to forward the challenge to the Interagency Security Classification Appeals Panel. The challenger may also forward the challenge to the Interagency Security Classification Appeals Panel if the Department has not responded to an internal appeal within 90 days after receiving the appeal. Responses to challenges denied by the Department shall also include the challenger's appeal rights to the Interagency Security Classification Appeals Panel.

### § 171.24 Access by historical researchers and former Presidential appointees.

(a) Section 4.2(a)(3) of this Executive Order 12958 restricts access to classified information to individuals who have a need-to-know the information. This may be waived for persons who are engaged in historical research projects or previously occupied policy-making positions to which they were appointed by the President. Access requests made under this provision must be submitted in writing and must include a general description of the records and the time period covered by the request.

(b) Access may be granted only if the Secretary of State or the senior agency official of the Department:

(1) Determines in writing that access is consistent with the interest of national security;

(2) Takes appropriate steps to protect classified information from unauthorized disclosure or compromise; and

(3) Ensures that the information is safeguarded in a manner consistent with the Executive Order 12958.

(c) Access granted to former Presidential appointees shall be limited to items the individual originated, reviewed, signed or received while serving as a Presidential appointee.

### § 171.25 Exemptions.

The Freedom of Information and Privacy Acts exemptions and any other exemptions under applicable law may be invoked by the Department to deny material on grounds other than classification.

## Subpart D—Privacy Provisions

### § 171.30 Definitions.

As used in this subpart, the following definitions shall apply:

(a) The term *Department* means the Department of State, its offices, bureaus, divisions, field offices, and its overseas posts.

(b) The term *individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) The term *maintain* includes maintain, collect, use or disseminate.

(d) The term *record* means any item, collection, or grouping of information about an individual that is maintained by the Department, including, but not limited to education, financial transactions, medical history, and criminal or employment history that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph.

(e) The term *system of records* means a group of any records under the control of the Department from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to an individual.

(f) The term *statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in

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whole or in part in making any determination about an identifiable individual, except as provided in 13 U.S.C. 8.

(g) The term *routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(h) The term *amend* means to make any correction to any portion of the record which the individual believes is not accurate, relevant, timely, or complete.

(i) The term *personnel record* means any personal information maintained in a system of records as defined in paragraph (e) of this section that is needed for personnel management programs or processes such as staffing, employee development, retirement, grievances, and appeals.

Rules and procedures promulgated by the Office of Personnel Management under the Privacy Act for personal records for which it has responsibility will be followed by the Department with regard to such records except when inconsistent with provisions of the Foreign Service Act.

## § 171.31 Identifying information.

All requests for access to a record or records must reasonably describe the system of records and the individual's record within the system in sufficient detail to permit identification of the requested record(s). System names, descriptions, and the identifying information required for each system are published in the Department's public notice of systems of records appearing in the FEDERAL REGISTER. As a minimum, requests should include the individual's full name (maiden name, if appropriate), present mailing address (including zip code), date and place of birth, and other information helpful in identifying the record. Helpful data includes circumstances which give the individual reason to believe that the Department of State maintains records under her/his name, as well as the approximate time period of the records. This information will facilitate the timely search of record systems and assist the Department in locating those records which actually pertain to the individual requester. In certain in-

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stances, it may be necessary for the Department to request additional information from the requester, either to ensure a full search or to ensure that a record retrieved does in fact pertain to the individual.

## § 171.32 Exemptions.

Portions of systems of records maintained by the Department are authorized to be exempted from a limited number of provisions of the Privacy Act. In utilizing these exemptions, however, the Department contemplates exempting only those portions of systems necessary for the proper functioning of the Department and which are consistent with the Privacy Act and these regulations. The following exemptions are authorized under 5 U.S.C. 552a(j) and (k):

(a) Records specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact, properly classified pursuant to such executive order (k)(1);

(b) Investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2): *Provided, however,* That if any individual is denied any right, privilege, or benefit for which she or he would otherwise be eligible as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of the regulations, under an implied promise that the identity of the source would be held in confidence (k)(2);

(c) Records maintained in connection with providing protective services to the President of the United States or other individuals, pursuant to 18 U.S.C. 3056 and 22 U.S.C. 2666 (k)(3);

(d) Records required by statute to be maintained and used solely as statistical records (k)(4);

(e) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment,



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military service, Federal contracts, nominations or referrals to international organizations, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of these regulations, under an implied promise that the identity of the source would be held in confidence (k)(5);

(f) Testing or examination material used solely to determine individual qualification for appointment or promotion to the Federal service which would compromise the objectivity or fairness of the testing or examinations process if disclosed (k)(6); or

(g) Evaluation material used to determine potential of an individual for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of these regulations, under an implied promise that the identity of the source would be held in confidence (k)(7); or

(h) Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. 52a (j). Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Fraud Branch of the Office of Security and by the Inspector General may be exempted from the requirements of any part of the Act except subsections (b), (c)(1) and (2), (e)(4) (A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to assure the effective completion of the investigative and judicial processes.

(i) Portions of the following systems of records are exempted under 5 U.S.C 552a(j) to the extent authorized and determined by the agency originating the records. The names of the systems correspond to those published in the FEDERAL REGISTER by the Department.

System Name: STATE DEPT.

Consular Service and Assistance Records. STATE-5.

Coordinator for Combatting Terrorism Records. STATE-6.

External Research Records. STATE-10.

Extradition Records. STATE-11.

Intelligence and Research Records. STATE-15.

International Organizations Records. STATE-17.

Law of the Sea Records. STATE-19.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-36.

Visa Records. STATE-39.

Munitions Control Records. STATE-42.  
Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.

(j) Portions of the following systems of records are exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (3) and (4), (G), (H), and (I), and (f). The names of the systems correspond to those published in the FEDERAL REGISTER by the Department.

(1) Exempt under 5 U.S.C. 552a(k)(1). The reason for invoking the exemption is to protect the material required to be kept secret in the interest of national defense and foreign policy.

Board of Appellate Review Records. STATE-2.

Consular Service and Assistance Records. STATE-5.

Coordinator for Combatting Terrorism Records. STATE-6.

External Research Records. STATE-10.

Extradition Records. STATE-11.

Foreign Assistance Inspection Records. STATE-48.

Intelligence and Research Records. STATE-15.

International Organizations Records. STATE-17.

Law of the Sea Records. STATE-19.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-36.

Visa Records. STATE-39.  
 Berlin Document Center. STATE-41.  
 Munitions Control Records. STATE-42.  
 Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.  
 Records of the Office of the Assistant Legal Adviser for International Claims and Investment Disputes. STATE-54.  
 Statements by Principals during the Strategic Arms Limitation Talks, Mutual Balanced Force Reduction negotiations, and the Standing Consultative Committee. ACDA-4.  
 (2) Exempt under 5 U.S.C. 552(a)(k)(2). The reasons for invoking the exemptions are to prevent individuals the subject of investigation from frustrating the investigatory process, to insure the integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the confidence of foreign governments in the integrity of the procedures under which privileged or confidential information may be provided; and to protect the confidentiality of sources of information.  
 Board of Appellate Review Records. STATE-2.  
 Consular Service and Assistance Records. STATE-5.  
 Coordinator for Combatting Terrorism Records. STATE-6.  
 Extradition Records. STATE-11.  
 Foreign Assistance Inspection Records. STATE-48.  
 Intelligence and Research Records. STATE-15.  
 Overseas Records. STATE-25.  
 Passport Records. STATE-26.  
 Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.  
 Personality Index to the Central Foreign Policy Records. STATE-29.  
 Security Records. STATE-39.  
 Visa Records. STATE-39.  
 Munitions Control Records. STATE-42.  
 Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.  
 Records of the Office of White House Liaison. STATE-34.  
 Garnishment of Wages Records. STATE-61.  
 Security Records. ACDA-3. Provided, however, that if any individual is de-

nied any right, privilege, or benefit to which the individual would otherwise be entitled by Federal law, or for which the individual would otherwise be eligible, as a result of the maintenance of such material, such material will be provided to such individual, except to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, if furnished to the Government prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(3) Exempt under 5 U.S.C. 552(a)(k)(3). The reason for invoking this exemption is to preclude impairment of the Department's effective performance in carrying out its lawful protective responsibilities under 18 U.S.C. 3056 and 22 U.S.C. 1666.

Consular Service and Assistance Records. STATE-5.  
 Extradition Records. STATE-11.  
 Intelligence and Research Records. STATE-15.  
 Overseas Records. STATE-25.  
 Passport Records. STATE-26.  
 Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.  
 Personality Index to the Central Foreign Policy Records. STATE-29.  
 Security Records. STATE-36.  
 Visa Records. STATE-39.

(4) Exempt under 5 U.S.C. 552a(k)(4). The reason for invoking this exemption is to avoid needless consideration of records which are used solely for statistical purposes and from which no individual determinations are made.

Foreign Service Institute Records. STATE-14.  
 Personnel Payroll Records. STATE-30.  
 Personnel Records. STATE-31.

(5) Exempt under 5 U.S.C. 552a(k)(5). The reasons for invoking this exemption are to insure the proper functioning of the investigatory process, to insure effective determination of stability, eligibility and qualification for employment and to protect the confidentiality of sources of information.

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Board of the Foreign Service Records. STATE-3.  
Equal Employment Opportunity Records. STATE-9.  
Foreign Assistance Inspection Records. STATE-48.  
Foreign Service Grievance Board Records. STATE-13.  
Legal Adviser Personnel Records. STATE-20.  
Overseas Records. STATE-25.  
Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.  
Personnel Records. STATE-31.  
Security Records. STATE-36.  
Senior Personnel Appointment Records. STATE-47.  
Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.  
Security Records. ACDA-3. This system contains investigatory materials compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information which is exempt from disclosure by the Act (5 U.S.C. 552a(k)(5)), but only to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or if furnished to the Government prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.  
(6) Exempt under 5 U.S.C. 552(k)(6). The reasons for invoking this exemption are to prevent the compromise of testing or evaluation material used solely to determine individual qualifications for employment or promotion, and to avoid giving unfair advantage to individuals by virtue of their having access to such material.  
Foreign Service Institute Records. STATE-14.  
Personnel Records. STATE-31.  
(7) Exempt under 5 U.S.C. 552a(k)(7). The reason for invoking this exemption is to prevent access to such material maintained from time to time by the Department in connection with various military personnel exchange programs.

Overseas Records. STATE-25.  
Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.  
Personality Index to the Central Foreign Policy Records. STATE-29.  
Personnel Records. STATE-31.  
(k) Portions of certain documents in the following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a (j) and (k) from subsections (c) (3) and (4); (d); (e)(4), (G), (H), and (f) of 5 U.S.C. 552a.  
Public Affairs Records. STATE-35.  
Privacy Act Requests Records. STATE-40.

[45 FR 58108, Sept. 2, 1980; 45 FR 62426, Sept. 19, 1980, as amended at 56 FR 6969, Feb. 21, 1991; 59 FR 2521, Jan. 18, 1994; 61 FR 68149, Dec. 27, 1996; 64 FR 10949, Mar. 8, 1999; 64 FR 18808, Apr. 16, 1999]

### § 171.33 Time limits.

Whenever possible, the Department will acknowledge the request within 10 days (excluding Saturdays, Sundays, and legal public holidays) of receipt of the request and furnish the requester information as soon as possible thereafter.

### § 171.34 Access to records.

(a) *Verification of personal identity.* The Department will require reasonable identification of individuals to assure that records are disclosed only to the proper person(s).

(1) *Access in person.* When access to a record is granted in person, the Department will require a verification of identity by the individual; employee identification card, driver's license, medicare card, annuitant identification, or passport are examples of acceptable identification.

(2) *Access by mail.* For individuals who seek access by mail, the Department will require verification of identity; comparison of signature of the requester and those in the record, if any, will be used to determine identity.

(3) *Statement verifying identity.* If an individual can provide no suitable documents for identification or a signature is not on record, the Department will require a signed statement from the individual asserting her or his identity and stipulating that the individual

understands that knowingly or willingly seeking or obtaining access to records about another individual under false pretenses is punishable by a fine of up to \$5,000.

(b) *Sensitive records.* In certain cases where the Department determines that the requested record is of sufficient sensitivity, it may require the individual to furnish a signed notarized statement verifying the requester's identity. The Department will inform the individual at the time the record is retrieved whether or not such a statement is necessary.

(c) *Accompanying individual.* If, when exercising physical access to a record, the requester is accompanied by any other person, the Department will require the requester to sign a statement authorizing disclosure of the contents of record in the presence of the accompanying individual.

(d) *Authorized representatives or designees.* When an individual wishes to authorize another person or persons access to her or his records other than as provided in paragraph (e) of this section, the individual shall submit a signed, notarized statement authorizing and consenting to access by a designated person or persons.

(e) *Guardians.* The parent(s) of any minor, or the legal guardian of an individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act for and on behalf of said individual upon presentation of appropriate documentation of such relationship.

(f) *Medical records.* If, in the judgment of the Deputy Assistant Secretary of State for Medical Services or her/his designee, the release of medical information directly to the requester could have an adverse effect on the requester, the aforementioned officer will attempt to arrange an acceptable alternative in granting access to such record(s). This will normally involve the release of such information to a doctor named by the requester.

(g) *Records relating to civil actions or proceedings.* The requirements of this section do not entitle an individual to the right of access to any information compiled in reasonable anticipation of a civil action or proceeding.

#### § 171.35 Requests for amending records.

(a) An individual has the right to request that the Department amend a record pertaining to her or him which the individual believes is not accurate, relevant, timely, or complete. At the time the Department grants access to a record it will also furnish guidelines for requesting amendments to the record. These guidelines will also be available in the public reading room in the Department of State, Washington, DC between 10 a.m. and 4 p.m. Monday through Friday, except for legal public holidays, or may be obtained by writing the Information and Privacy Coordinator, Foreign Affairs Information Management Center, Department of State, Room 1239, Washington, DC 20520.

(b) Requests for amending records must be in writing and mailed or delivered to the Information and Privacy Coordinator, Foreign Affairs Information Management Center, Department of State, Room 1239, Washington, DC 20520, who will coordinate the review of the request to amend a record with the appropriate office(s). The Department will require verification of personal identity as provided § 154.5(c)(3) of these regulations before it will initiate action to amend a record to ensure that the requester is not deliberately or inadvertently seeking to change records about other persons. Such requests should contain, as a minimum, identifying information needed to locate the record, a brief description of the items of information to be amended, and the nature of the requested amendment. The requester should submit as much documentation, arguments or other data as seems warranted to support her/his request for amendment.

(c) All requests for amendments to records will be acknowledged within 10 days (excluding Saturdays, Sundays, and legal public holidays). Whenever possible all requests for amendments to records will be reviewed within 10 days (excluding Saturdays, Sundays, and legal public holidays) of their receipt by the Office responsible for the record, and the requester will be advised of the results of the review. In those cases where the review cannot be completed within 10 days, the requester will be so

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advised and informed when the review will be completed. Except in unusual circumstances, this review will be completed no later than 30 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of the request to amend a record.

(d) In reviewing a record in response to a request to amend, the Department shall determine whether the record is relevant and necessary to accomplish a purpose of the agency and shall incorporate the criteria of accuracy, relevance, timeliness, and completeness of the record in that review.

(e) If the office responsible for the record agrees with an individual's request to amend a record, it shall:

(1) Advise the individual in writing;

(2) Amend the record accordingly; and

(3) If an accounting of disclosure has been made, advise all previous recipients of the record of the amendment and its substance.

(f) If the office responsible for the record, after an initial review of a request to amend a record disagrees with all or any portion of the requested amendment, an officer at the Deputy Assistant Secretary level or equivalent, shall:

(1) Advise the individual of its refusal and the reasons for it; and

(2) Inform the individual that she or he may request a further review in accordance with subpart G.

### Subpart E—Ethics in Government Provisions

#### § 171.40 Covered employees.

(a) Officers and employees, including special government employees, whose positions are classified at grades GS-16 and above or at any equivalent rate under another pay schedule;

(b) Officers or employees in a position determined by the Director of the Office of Government Ethics to be of equal classification to GS-16;

(c) Employees in the excepted service in positions which are of a confidential or policy-making nature unless an employee or groups of employees are ex-

empted by the Director of the Office of Government Ethics;

(d) The designated agency official who acts as the Department's Ethics Officer; and

(e) Individuals who are nominated for positions requiring Senate confirmation by the President but who are *not* subsequently confirmed by the Senate.

#### § 171.41 Identifying information.

(a) The name and/or position title of the Department of State official who is subject of the request,

(b) The time period covered by the report requested, and

(c) Completion of an Ethics Request Form.

#### § 171.42 Time limits.

(a) Reports shall be made available to the public within fifteen (15) days after receipt by the Department.

(b) Reports shall be retained by the Department and made available to the public for a period of six (6) years. The exceptions are those reports which are filed by individuals who are nominated for office by the President and are not confirmed by the Senate; those reports will be retained and made available for a one-year period.

#### § 171.43 Access to, and use of, reports.

The Attorney General is authorized to bring a civil action against any person who obtains or uses a financial disclosure report:

(a) For any unlawful purpose;

(b) For any commercial purpose, other than for news or community dissemination to the general public;

(c) For determining or establishing the credit rating of any individual; or

(d) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

The court may assess a civil penalty not to exceed \$5,000 against any person who obtains or uses the reports for these prohibited purposes; an additional remedy as available under statutory or common law may also be assessed at the discretion of the court.

### Subpart F—Denial Procedures

#### § 171.50 Denials of access or of amendment.

The decision to deny an individual access to records, or to deny an amendment request under Privacy Act provisions shall be made by: (a) The Department official of a rank not below the Deputy Assistant Secretary or equivalent level who is responsible for the system of records involved, (b) the Deputy Assistant Secretary for the Classification/Declassification Center, or her/his designees, (c) the Director/Deputy Director of Mandatory Review and the Director of Systematic Review in A/CDC, and (d) officials designated by the Under Secretary for Management/Chairman of the Oversight Committee for E.O. 12065. When an authorized official denies access to a record or portion thereof, the official will advise the individual in writing of the denial and the specific reasons therefor. The denial letter will also advise the individual of her/his right to seek administrative review of the Department's decision.

### Subpart G—Appeals Procedures

#### § 171.60 Appeal of denial of access to records.

(a) Review of an initial denial of access to a record under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or Executive Order 12065 may be requested by the individual who submitted the initial request for access. The request for review (hereinafter referred to as the appeal) must be in writing and should be sent by certified mail to the Assistant Secretary for Public Affairs, Chairperson, Appeals Review Panels, Department of State, 2201 C street, NW., Washington, DC 20520. The appeal should be received within 60 days of the date of receipt by the appellant of the Department's refusal to grant access to a record in whole or in part.

(b) The time for decision on the appeal begins on the date the appeal is received by the Chairperson, Appeals Review Panels. The appeal of a denial of access to records shall include any documentation, information and statements to support the individual's re-

quest for access and to refute the use of the exemption(s) cited in the Department's justification concerning the denial of access.

(c) The Chairperson of the Appeals Panels or her/his designee and at least two other members chosen by her/him from a list of senior officers designated for this purpose by the various bureaus of the Department shall constitute a panel to consider and decide the appeal. There shall be a written record of the reasons for the final determination. The final determination will be made within 30 working days for executive order and Privacy Act appeals, and within 20 working days (excluding Saturdays, Sundays, and holidays) for FOIA appeals. For good cause shown, the Chairperson of the Appeals Review Panels may extend such determination beyond the 30-day period in Privacy Act cases.

(d) The Chairperson shall then notify the requester in writing of the panel's decision to grant access and of the Department's regulations concerning access.

(e) When the final decision of the Panel is to refuse to grant an individual access to a record, the Chairperson of the Panel shall advise the individual in writing:

(1) Of the refusal to grant the appeal and the reasons therefor including the exemptions of the Freedom of Information Act, the Privacy Act of 1974, and/or Executive Order 12065 under which access is denied;

(2) Of her/his right to seek judicial review of the Department's decision, where applicable.

[45 FR 58108, Sept. 2, 1980, as amended at 49 FR 16990, Apr. 23, 1984]

#### § 171.61 Appeal of refusal to amend records.

(a) Review of an initial refusal to amend a record under the Privacy Act of 1974 may be requested by the individual who submitted the initial request for amendment. The review (hereinafter referred to as the appeal) should be requested in writing within 60 days of the date the individual is informed of the Department's refusal to amend a record in whole or in part. The appeal must be in writing and should

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be sent by certified mail to the Assistant Secretary for Public Affairs, Chairperson, Appeals Review Panels, Department of State, 2201 C Street, NW, Washington, DC 20520.

(b) The time for decision on the appeal begins on the date the appeal is received by the Chairperson, Appeals Review Panels. The appeal should include any documentation, information or statements advanced for the amendment of the record.

(c) The Chairperson of the Appeals Review Panels and two other members of the Panels designated by him shall constitute a panel to consider and decide the appeal; there shall be a written record of the reasons for the final determination. The final determination will be made within 30 days (excluding Saturdays, Sundays, and legal public holidays), unless for good cause shown, the Chairperson of the Appeals Review Panels extends such determination beyond the 30-day period.

(d) When the final determination is that the record should be amended in accordance with the individual's request, the Chairperson of the Appeals Review Panels shall direct the office responsible for the record to comply. A responsible official of the Department shall then:

- (1) Amend the records as directed;
- (2) If any accounting of the disclosure has been made, advise all previous recipients of the record of the amendment and its substance;
- (3) So advise the individual in writing.

(e) When the final decision is that the request of the individual to amend the record is refused, the Chairperson of the Panels shall advise the individual:

- (1) Of the refusal and the reasons for it;
- (2) Of her and his right to file a concise statement of the reasons for disagreeing with the decision of the Department;
- (3) Of the procedures for filing the statement of disagreement;
- (4) That the statement which is filed will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Department, a brief statement by the Department summarizing its

reasons for refusing to amend the record;

(5) That prior recipients of the disputed record will be provided a copy of any statement of dispute to the extent that an accounting of disclosures was maintained; and

(6) Of her/his right to seek judicial review of the Department's refusal to amend the record.

(f) When the final determination is to refuse to amend a record and the individual has filed a statement under paragraph (e) of this section, the Department will clearly annotate the record so that the fact that the record is disputed is apparent to anyone who may subsequently have access to, use, or disclose it. When information that is the subject of a statement of dispute filed by an individual is subsequently disclosed, the Department will note that the information is disputed and provide a copy of the individual's statement. The Department may also include a brief summary of the reasons for not making a correction when disclosing disputed information. Such statements will normally be limited to the reasons given to the individual for not amending the record. Copies of the Department's statement shall be treated as part of the individual's record for granting access; however, it will not be subject to amendment by the individual under these regulations.

[45 FR 58108, Sept. 2, 1980, as amended at 49 FR 16990, Apr. 23, 1984]

## Subpart H—Other Agency Material

### § 171.70 Referral.

While processing a request for access, the Department may locate in its files documents originated by other Federal agencies. The Department shall refer the documents to the originating agency for review and possible declassification and release to the requester. The originating agency is then responsible for contacting the requester directly concerning the release of the material and for notifying the Department of its determination. The Department of State will notify the requester of the referral unless the association of the reviewing agency with the information

requires protection in the interest of national security.

**§ 171.71 Concurrence.**

While processing a request for access, the Department may locate Department of State documents containing information originated by or of substantive interest to other Federal agencies. The Department shall refer these documents or portions thereof to the originating or interested agency for review, possible declassification and concurrence regarding the documents' release. The other agency will then return the documents to the Department so that it may contact the requester regarding the material.

**PART 172—SERVICE OF PROCESS; PRODUCTION OR DISCLOSURE OF OFFICIAL INFORMATION IN RESPONSE TO COURT ORDERS, SUBPOENAS, NOTICES OF DEPOSITIONS, REQUESTS FOR ADMIS- SIONS, INTERROGATORIES, OR SIMILAR REQUESTS OR DEMANDS IN CONNECTION WITH FEDERAL OR STATE LITIGATION; EXPERT TESTIMONY**

Sec.

- 172.1 Purpose and scope; definitions.
- 172.2 Service of summonses and complaints.
- 172.3 Service of subpoenas, court orders, and other demands or requests for official information or action.
- 172.4 Testimony and production of documents prohibited unless approved by appropriate Department officials.
- 172.5 Procedure when testimony or production of documents is sought; general.
- 172.6 Procedure when response to demand is required prior to receiving instructions.
- 172.7 Procedure in the event of an adverse ruling.
- 172.8 Considerations in determining whether the Department will comply with a demand or request.
- 172.9 Prohibition on providing expert or opinion testimony.

AUTHORITY: 5 U.S.C. 301; 8 U.S.C. 1202(f); 22 U.S.C. 2658, 2664, 3926.

SOURCE: 57 FR 32896, July 24, 1992, unless otherwise noted.

**§ 172.1 Purpose and scope; definitions.**

(a) This part sets forth the procedures to be followed with respect to:

(1) Service of summonses and complaints or other requests or demands directed to the Department of State (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and

(2) The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial authority (collectively, "demands"), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, or other litigation-related matters, pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, "requests"), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was an employee of the Department as part of the performance of that person's duties or by virtue of that person's official status.

(b) For purposes of this part, and except as the Department may otherwise determine in a particular case, the term *employee* includes the Secretary and former Secretaries of State, and all employees and former employees of the Department of State or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of State or his Chiefs of Mission, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors.

(c) For purposes of this part, the term *litigation* encompasses all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards (including the Board of Appellate Review), or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature. This part governs, *inter alia*, responses to discovery requests,



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depositions, and other pre-trial, trial, or post-trial proceedings, as well as responses to informal requests by attorneys or others in situations involving litigation. However, this part shall not apply to any claims by Department of State employees (present or former), or applicants for Department employment, for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission; the U.S. Merit Systems Protection Board; the Office of Special Counsel; the Federal Labor Relations Authority; the Foreign Service Labor Relations Board; the Foreign Service Grievance Board; or a labor arbitrator operating under a collective bargaining agreement between the Department and a labor organization representing Department employees; or their successor agencies or entities.

(d) For purposes of this part, *official information* means all information of any kind, however stored, that is in the custody and control of the Department, relates to information in the custody and control of the Department, or was acquired by Department employees as part of their official duties or because of their official status within the Department while such individuals were employed by or served on behalf of the Department.

(e) Nothing in this part affects disclosure of information under the Freedom of Information Act (FOIA), 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, Executive Order 12356 on national security information (3 CFR, 1982 Comp., p. 166), the Government in the Sunshine Act, 5 U.S.C. 552b, the Department's implementing regulations in 22 CFR part 171 or pursuant to congressional subpoena. Nothing in this part otherwise permits disclosure of information by the Department or its employees except as provided by statute or other applicable law.

(f) This part is intended only to inform the public about Department procedures concerning the service of process and responses to demands or requests and is not intended to and does not create, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department or the United States.

(g) Nothing in this part affects:

(1) The disclosure of information during the course of legal proceedings in non-United States courts, commissions, boards, or other judicial or quasi-judicial bodies or tribunals; or

(2) The rules and procedures, under applicable U.S. law and international conventions, governing diplomatic and consular immunity.

(h) Nothing in this part affects the disclosure of official information to other federal agencies or Department of Justice attorneys in connection with litigation conducted on behalf or in defense of the United States, its agencies, officers, and employees, or to federal, state, local, or foreign prosecuting and law enforcement authorities in conjunction with criminal law enforcement investigations, prosecutions, or other proceedings, *e.g.*, extradition, deportation.

### § 172.2 Service of summonses and complaints.

(a) Only the Executive Office of the Office of the Legal Adviser (L/EX) is authorized to receive and accept summonses or complaints sought to be served upon the Department or Department employees. All such documents should be delivered or addressed to The Executive Office, Office of the Legal Adviser, room 5519, United States Department of State, 2201 C Street, NW., Washington, DC 20520-6310.

(b) In the event any summons or complaint described in § 172.1(a) is delivered to an employee of the Department other than in the manner specified in this part, such attempted service shall be ineffective, and the recipient thereof shall either decline to accept the proffered service or return such document under cover of a written communication which directs the person attempting to make service to the procedures set forth herein.

(c) Except as otherwise provided §§ 172.2(d) and 173.3(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance

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of official duties may, however, be served upon L/EX.

(d) Although the Department is not an agent for the service of process upon its employees with respect to purely personal, non-official litigation, the Department recognizes that its employees stationed overseas should not use their official positions to evade their personal obligations and will, therefore, counsel and encourage Department employees to accept service of process in appropriate cases, and will waive applicable diplomatic or consular privileges and immunities when the Department determines that it is in the interest of the United States to do so.

(e) Documents for which L/EX accepts service in official capacity only shall be stamped “Service Accepted in Official Capacity Only”. Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under the laws of rules applicable for the service of process.

#### **§ 172.3 Service of subpoenas, court orders, and other demands or requests for official information or action.**

(a) Except in cases in which the Department is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only L/EX is authorized to receive and accept subpoenas, or other demands or requests directed to the Department, or any component thereof, or its employees, or former employees, whether civil or criminal nature, for:

(1) Material, including documents, contained in the files of the Department;

(2) Information, including testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the Department or which any Department employee acquired in the course and scope of the performance of his official duties;

(3) Garnishment or attachment of compensation of current or former employees; or

(4) The performance or non-performance of any official Department duty.

(b) In the event that any subpoena, demand, or request is sought to be delivered to a Department employee (including former employees) other than in the manner prescribed in paragraph (a) of this section, such attempted service shall be ineffective. Such employee shall, after consultation with the Office of the Legal Adviser, decline to accept the subpoena, demand or request or shall return them to the server under cover of a written communication referring to the procedures prescribed in this part.

(c) Except as otherwise provided in this part, the Department is not an agent for service, or otherwise authorized to accept on behalf of its employees any subpoenas, show-cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, which are not related to the employees’ official duties except upon the express, written authorization of the individual Department employee to whom such demand or request is directed.

(d) Acceptance of such documents by L/EX does not constitute a waiver of any defenses that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable rules.

#### **§ 172.4 Testimony and production of documents prohibited unless approved by appropriate Department officials.**

(a) No employee of the Department shall, in response to a demand or request in connection with any litigation, whether criminal or civil, provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any information acquired while such person is or was an employee of the Department as part of the performance of that person’s official duties or by virtue of that person’s official status, unless authorized to do so by the Director General of the Foreign Service and Director of Personnel (M/DGP) or the Legal Adviser (L), or delegates of either, following consultation between the two bureaus, or as authorized in § 172.4(b).

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(b) With respect to the official functions of the Passport Office, the Visa Office, and the Office of Citizens Services, the Assistant Secretary of State for Consular Affairs or delegate thereof may, subject to concurrence by the Office of the Legal Adviser, authorize employees to provide oral or written testimony.

(c) No employee shall, in response to a demand or request in connection with any litigation, produce for use at such proceedings any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Director General of the Foreign Service and Director of Personnel, the Legal Adviser, or the Assistant Secretary of State for Consular Affairs, or the delegates thereof, as appropriate, following consultations between the concerned bureaus.

### **§ 172.5 Procedure when testimony or production of documents is sought; general.**

(a) If official Department information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the Legal Adviser) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought. Where documents or other materials are sought, the party should provide a description using the types of identifying information suggested in 22 CFR 171.10(a) and 171.31. Subject to § 172.7, Department employees may only produce, disclose, release, comment upon, or testify concerning those matters which were specified in writing and properly approved by the appropriate Department official designated in § 172.4. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The Office of the Legal Adviser may waive this requirement in appropriate circumstances.

(b) To the extent it deems necessary or appropriate, the Department may also require from the party seeking such testimony or documents a plan of all reasonably foreseeable demands, in-

cluding but not limited to the names of all employees and former employees from whom discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, and identification of potentially relevant documents.

(c) The appropriate Department official designated in § 172.2 will notify the Department employee and such other persons as circumstances may warrant of its decision regarding compliance with the request or demand.

(d) The Office of the Legal Adviser will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

### **§ 172.6 Procedure when response to demand is required prior to receiving instructions.**

(a) If a response to a demand is required before the appropriate Department official designated in § 172.4 renders a decision, the Department will request that either a Department of Justice attorney or a Department attorney designated for the purpose:

(1) Appear with the employee upon whom the demand has been made;

(2) Furnish the court or other authority with a copy of the regulations contained in this part;

(3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official; and

(4) Respectively request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of a Department of Justice or Department attorney on the employee's behalf, the employee shall respectfully request the demanding court or authority for a reasonable stay of proceedings for the purpose of obtaining instructions from the Department.

### **§ 172.7 Procedure in the event of an adverse ruling.**

If the court or other judicial or quasi-judicial authority declines to

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stay the effect of the demand in response to a request made pursuant to § 172.6, or if the court or other authority rules that the demand must be complied with irrespective of the Department's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this part and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

### **§ 172.8 Considerations in determining whether the Department will comply with a demand or request.**

(a) In deciding whether to comply with a demand or request, Department officials and attorneys shall consider, among others:

(1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;

(2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for private purposes;

(6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;

(7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and

(8) The need to avoid involving the Department in controversial issues not related to its mission.

(b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which, *inter alia*, any of the following factors exist:

(1) Compliance would violate a statute or a rule of procedure;

(2) Compliance would violate a specific regulation or executive order;

(3) Compliance would reveal information properly classified in the interest of national security;

(4) Compliance would reveal confidential commercial or financial information or trade secrets without the owner's consent;

(5) Compliance would reveal the internal deliberative processes of the Executive Branch; or

(6) Compliance would potentially impede or prejudice an on-going law enforcement investigation.

### **§ 172.9 Prohibition on providing expert or opinion testimony.**

(a) Except as provided in this section, and subject to 5 CFR 2635.805, Department employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official Department duties, except on behalf of the United States or a party represented by the Department of Justice.

(b) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the appropriate Department official designated in § 172.4 may, consistent with 5 CFR 2635.805, in their discretion and with the concurrence of the Office of the Legal Adviser, grant special, written authorization for Department employees to appear and testify as expert witnesses at no expense to the United States.

(c) If, despite the final determination of the appropriate Department official designated in § 172.4, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a Department employee, such employee shall immediately inform the Office of the Legal Adviser of such order. If the Office of the Legal Adviser determines that no further legal review of or challenge to the court's order will be made, the Department employee shall comply with the order. If so directed by the Office of the Legal Adviser, however, the employee shall respectfully decline to testify. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).